



COMMONWEALTH OF KENTUCKY
ETHICS COMMITTEE OF THE KENTUCKY JUDICIARY

ADMINISTRATIVE OFFICE OF THE COURTS
100 MILLCREEK PARK
FRANKFORT, KENTUCKY 40601-9230

LAURANCE B. VANMETER
COURT OF APPEALS

JEAN CHENAULT LOGUE
CIRCUIT COURT

DONALD H. COMBS
ATTORNEY

ARNOLD S. TAYLOR
ATTORNEY CHAIR

JEFFREY SCOTT LAWLESS
DISTRICT COURT

FORMAL
JUDICIAL ETHICS OPINION JE-118

August 31, 2009

REVISION OF JUDICIAL ETHICS OPINIONS ("JE") 67 and 78

In the course of its ongoing review of existing Judicial Ethics Opinions, the Committee discussed a possible contradiction between JE-67, prohibiting a judge from serving on an advisory board of a local bank, and JE-78, permitting a district judge to serve as a director of a local bank. In addition, the Committee received two inquiries from judges concerning this issue.

MAY A KENTUCKY JUDGE OR JUSTICE, CONSISTENT WITH THE CODE OF JUDICIAL CONDUCT, SERVE AS A DIRECTOR ON THE BOARD OF DIRECTORS OR ON THE ADVISORY BOARD OF A FINANCIAL INSTITUTION?

The Committee has concluded that the current answer to the question is a "Qualified No," irrespective of the type of director, and irrespective of the level of judiciary on which the judge serves. The Committee hereby withdraws both JE-67 and JE-78, and substitutes this opinion.

Canon 4D specifically provides:

- (3) A judge may serve as an officer, director, manager, general partner, advisor or employee of any business entity subject to the following limitations and the other requirements of this Code:
 - (a) A judge shall not be involved with any business entity
 - (i) generally held in disrepute in the community, or
 - (ii) likely to be engaged in proceedings that would ordinarily come before the judge, or
 - (iii) likely to be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

- (b) A judge involved with any business entity may assist such a business entity in planning fund-raising and may participate in the management and investment of the entity's funds, but shall not personally participate in the solicitation of funds, the raising of capital or the selling of stock in such a manner as to use or permit the use of the prestige of judicial office for promotion of the business entity.

The Commentary to this section provides:

Subject to the requirements of this Code, a judge may participate in a business. Although participation by a judge in a business might otherwise be permitted by Section 4D(3), a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a business if the judge's participation would involve misuse of the prestige of judicial office.

Service on an Advisory Board. The Committee notes the express language of Canon 4D(3) seemingly permits a judge to act as an advisor to a business entity. The Commentary, however, cautions that such service may be prohibited by other provisions of the Code. In this regard, Canon 2D states that "[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others." Just as in JE-67, the Committee is unable to ascertain any purpose to an Advisory Board other than to lend the judge's name "to enhance the prestige of the institution to enable it to draw more business." The Committee in JE-78 appeared to make the distinction that JE-67 involved a circuit judge's service on an Advisory Board. The Committee, however, believes that the restriction imposed by Canon 2D applies equally to any judge, irrespective of the level in the Kentucky judiciary in which the judge, or justice, serves.

Service on a Board of Directors. Again, the Committee notes the express language of Canon 4D(3) generally permits a judge to serve as a director of a business entity. However, subsection (a) states that "a judge shall not be involved with any business entity . . . (ii) likely to be engaged in proceedings that would ordinarily come before the judge, or (iii) likely to be engaged frequently in adversary proceedings in the court of which the judge is a member. . . ." The Code does not contain a definition of "frequent". The word's common meaning is "happening often or at close intervals". Webster's II New Riverside Dictionary (New York: Berkley Publ. Co., 1984). Common knowledge is that banks, by their business, are likely to be

engaged in proceedings that would ordinarily come before the judge and/or engaged frequently in adversary proceedings in the court of which the judge is a member. Certainly, banks are engaged in litigation much more frequently than other businesses.

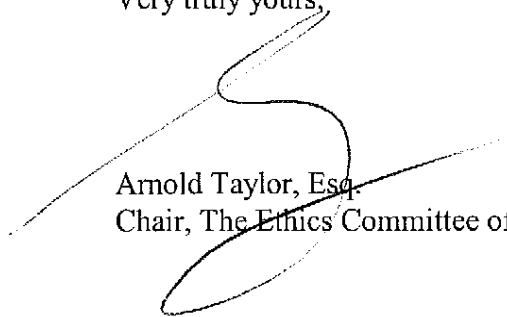
While a judge's disqualification in a proceeding due to serving as a director of a party may be subject to remittal under Canon 3F, the Committee notes the broad language of subsection (iii) is directed to "adversary proceedings in the court of which the judge is a member." This language imparts a much broader prohibition than, for example, "adversary proceedings before the judge". Thus, the prohibition clearly extends to all circuit, family,¹ and appellate judges and justices.

Additionally, while the Committee drew a distinction between district and circuit judges in JE 78, the Committee believes the risk too great that any judge, irrespective of level of judicial service, would implicitly be using, and allowing, the prestige of the judicial office to enhance the prestige of the institution to enable it to draw more business.

The Committee recognizes the right of a Judge to have and maintain investments, and if a Judge has invested personal funds in a banking company, he or she has a right to be elected to a Board of Directors and participate in oversight of the investment. However, service without any such personal financial investment, or by reason of some gratuitous grant of stock to the Judge, is prohibited by the Canons.

Please be aware that opinions issued by or on behalf of the Committee are restricted to the content and scope of the Canons of Judicial Ethics and legal authority interpreting those Canons, and the fact situation on which an opinion is based may be affected by other laws or regulations. Persons contacting the Judicial Ethics Committee are strongly encouraged to seek counsel of their own choosing to determine any unintended legal consequences of any opinion given by the Committee or some of its members.

Very truly yours,



Arnold Taylor, Esq.
Chair, The Ethics Committee of the Kentucky Judiciary

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¹ Under the Kentucky Constitution, all family court judges are circuit judges, and "retain the general jurisdiction of the Circuit Court." Ky. Const. § 112(6).

JUDICIAL ETHICS OPINION JE-118

August 31, 2009

Page 4

cc: Donald H. Combs, Esq.
The Honorable Laurance B. VanMeter, Judge
The Honorable Jean Chenault Logue, Judge
The Honorable Jeffrey Scott Lawless, Judge
Jean Collier, Esq.